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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JOSEPH S. HOPPER, Commissioner, Alabama Department of Corrections, and
JAMES D. WHITE, Warden, Holman Prison,

PETITIONERS

v.

JOHN LOUIS EVANS,

RESPONDENT

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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ARGUMENT

I.

EVANS' ARGUMENTS CONCERNING THE VALIDITY OF HIS CONVICTION SHOULD BE REJECTED

A. Evans' Argument Concerning The Jury Verdict Form Requirement

On pp. 16-18 of his brief, Evans appears to argue that, even disregarding the preclusion clause, his *conviction* should be set aside because of the jury verdict form requirement discussed in *Beck v. Alabama*, 447 U.S. 625, 633, 638-645 (1980). That statutory provision required that every verdict form convicting a defendant of a capital offense "fix the punishment at death," *Code of Alabama* 1975, §13-11-2(a), even though the actual sentencing decision was made later by the trial court judge following a post-conviction hearing. *Id.*, at §§13-11-3 and 13-11-4 (R. 67; Tr. 9-15, 229-243).

While Alabama's pre-*Beck* statute under which Evans was convicted was not actually a mandatory death penalty statute (R. 67), it was "an apparently mandatory death penalty statute" from the jury's perspective because the jury was not told of the trial judge's sentencing function. *Beck v. Alabama*, 447 U.S. at 638-639 & n. 15.

This Court did note in *Beck* that, "the apparently mandatory nature of the death penalty may encourage it [the jury] to acquit for an equally impermissible reason — that, whatever his crime, the defendant does not deserve death." *Id.*, at 642-643 (footnote omitted). This Court also observed that, "it is manifest that the jury's verdict must have a tendency to motivate the judge to impose the same sentence that the jury did." *Id.*, at 645. The facts in *Beck* were entirely different from the facts in this case, but even assuming that the verdict form requirement had the maximum imaginable effect on this case, it could only have affected Evans' sentence and not his conviction.

There are only two conceivable effects that the verdict

form requirement could ever have had in any case. One is to have impermissibly encouraged an acquittal. *Beck v. Alabama*, 447 U.S. at 642-643. This Court has never before suggested that a defendant is entitled to have his conviction reversed because of an error which improperly encouraged the jury to *acquit* him, and it should not do so now. Evans' argument that he was "clearly prejudiced" by the verdict form requirement because "the jury's determination of Evans' guilt may have been impermissibly infected" by that requirement is utter nonsense. If the jury's guilt determination was "infected" by the verdict form requirement at all, it was infected in Evans' favor, and he was convicted in spite of the verdict form rather than because of it.

The only other conceivable effect the verdict form requirement could ever have had in any case was to have improperly motivated or encouraged the trial judge to sentence the defendant to death. *Beck v. Alabama*, 447 U.S. at 645. That did not happen in this case, for the reasons discussed on pp. 18-19, *infra*. But even assuming that it did, such an error could only have affected the sentence and not the conviction. This Court has never held that an error which affects a capital sentencing decision vitiates an otherwise valid capital conviction. Indeed, it has always held to the contrary.

In *Witherspoon v. Illinois*, 391 U.S. 510, 523 n. 21 (1968), this Court held that its decision did not "render invalid the *conviction*, as opposed to the *sentence* . . ." The per curiam opinion in *Furman v. Georgia*, 408 U.S. 238, 240 (1972), reversed the judgment in each case included therein only "insofar as it leaves undisturbed the death sentence imposed," and remanded each case for further proceedings not inconsistent with that opinion. *Accord, e.g., Woodson v. Louisiana*, 428 U.S. 280, 305 (1976) (joint opinion of Stewart, Powell, and Stevens, J.J.); *Lockett v. Ohio*, 438 U.S. 586, 608-609 (1978); *Adams v. Texas*, 448 U.S. 38, 51 (1980); *Eddings v. Oklahoma*, 102 S. Ct. 869, 877 (1982). Sentencing errors simply do not undermine otherwise valid convictions. *Cf., Brady v. Maryland*, 373 U.S. 83, 88-90 (1963) (remedy for suppression of evidence material only to sen-

tencing is limited to ordering a new sentence hearing).

After vacating the death sentence in *Gardner v. Florida*, 430 U.S. 349, 362 (1977), this Court remanded the case to the court below "with directions to order further [sentence] proceedings at the trial court level not inconsistent with this opinion." Likewise, *Estelle v. Smith*, 451 U.S. 454, 473-474 (1981), recognized that where this Court finds error in a capital sentence but the conviction "remains undisturbed, the State is free to conduct further [capital sentence] proceedings not inconsistent with this [Court's] opinion." Accordingly, even if this Court concludes that the verdict form requirement affected the sentence in this case, the ultimate result should be like that in *Gardner* and *Estelle*. Evans' capital conviction should be reinstated and the State should be free to conduct new sentence proceedings in this case.[1] The verdict form requirement is simply not relevant to the validity of Evans' *conviction*.[2]

B. Evans' Argument Concerning the Harm and Prejudice Requirement in Eighth Amendment Cases

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[1]As *Estelle v. Smith*, *supra*, implies, whether curative sentence proceedings can be conducted or the sentence should be commuted to one less than death is a question of state law. *See, Spivey v. Zant*, 661 F. 2d 464, 478-479 (5th Cir. 1981); *Battie v. Estelle*, 655 F. 2d 692, 703 (5th Cir. 1981); *cf., Rose v. Hodges*, 423 U.S. 19 (1975) (holding that whether and how to commute a pre-*Furman* death sentence is not a federal issue).

Alabama law does provide for curative sentence proceedings to correct errors which affect a capital sentence but not the conviction. *E.g., Johnson v. State*, 399 So. 2d 859, 874 (Ala. 1979); *Cook v. State*, 369 So. 2d 1251, 1257-1258 (Ala. 1979). If necessary, a new sentence proceeding in this case could be conducted before a new jury in accordance with the guidelines set out in *Beck v. State*, 396 So. 2d 645, 662-664 (Ala. 1980). *See, Ritter v. State*, 403 So. 2d 154, 157 (Ala.) (separate opinion of Jones, J., joined by Maddox and Adams, J.J.), *vacated and remanded on other grounds*, 102 S. Ct. 376 (1981). The new sentencing jury would not be informed of the mandatory penalty language contained in the verdict of the jury which convicted Evans, and the new sentence decision would therefore not be tainted by it.

[2]For the reasons discussed on pp. 18-19, *infra*, Evans' sentence as well as his conviction is valid and should be reinstated.

Evans' argument that it is not necessary for him to prove that the preclusion clause harmed or prejudiced him because this is an Eighth Amendment case should be rejected for two independently adequate reasons. First, the validity of Evans' conviction is controlled by the Due Process Clause, not the Eighth Amendment. Second, even if the Eighth Amendment were controlling, lack of harm or effect would still be relevant.

1. The Due Process Clause and Not the Eighth Amendment Controls the Validity of the Conviction

Evans' habeas petition itself recognizes that the Eighth Amendment is not relevant to the validity of his conviction. In neither his original nor amended petition did Evans ever allege that his *conviction* was invalid on Eighth Amendment grounds. (A. 48-51, 57)[3] Instead, the petition's only averment that the preclusion clause affected the validity of Evans' conviction was an allegation that the clause "which precluded juries from considering lesser included offenses violated his right to due process of law." Respondent's Brief at 10 (footnote omitted).

Evans' contention that *Beck v. Alabama*, 447 U.S. 625 (1980), is based on the Eighth Amendment's Cruel and Unusual Punishment Clause rather than the Due Process Clause is wrong. Both grounds were argued in *Beck* and the decision does not explicitly specify either, but the opinion is concerned more with due process considerations of fairness and with the integrity of the factfinding process than with what constitutes cruel and unusual punishment.[4] This

[3]Paragraph 12 of the petition did say that Evans' "conviction and sentence were obtained in violation of his rights as guaranteed by the Eighth and Fourteenth Amendments," but it went on to specify that his conviction was attacked on Fourteenth Amendment grounds while his sentence was attacked on both Eighth and Fourteenth Amendment grounds. (A. 49-50)

[4]Likewise, rather than being concerned with notions of cruel and unusual punishment, the court below decided this case on what it perceived to be "fundamental notions of fairness." 628 F. 2d at 401, Pet. App. at 20a.

tencing is limited to ordering a new sentence hearing).

After vacating the death sentence in *Gardner v. Florida*, 430 U.S. 349, 362 (1977), this Court remanded the case to the court below "with directions to order further [sentence] proceedings at the trial court level not inconsistent with this opinion." Likewise, *Estelle v. Smith*, 451 U.S. 454, 473-474 (1981), recognized that where this Court finds error in a capital sentence but the conviction "remains undisturbed, the State is free to conduct further [capital sentence] proceedings not inconsistent with this [Court's] opinion." Accordingly, even if this Court concludes that the verdict form requirement affected the sentence in this case, the ultimate result should be like that in *Gardner* and *Estelle*. Evans' capital conviction should be reinstated and the State should be free to conduct new sentence proceedings in this case.[1] The verdict form requirement is simply not relevant to the validity of Evans' *conviction*.[2]

B. Evans' Argument Concerning the Harm and Prejudice Requirement in Eighth Amendment Cases

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[1]As *Estelle v. Smith*, *supra*, implies, whether curative sentence proceedings can be conducted or the sentence should be commuted to one less than death is a question of state law. *See, Spivey v. Zant*, 661 F. 2d 464, 478-479 (5th Cir. 1981); *Battie v. Estelle*, 655 F. 2d 692, 703 (5th Cir. 1981); *cf., Rose v. Hodges*, 423 U.S. 19 (1975) (holding that whether and how to commute a pre-*Furman* death sentence is not a federal issue).

Alabama law does provide for curative sentence proceedings to correct errors which affect a capital sentence but not the conviction. *E.g., Johnson v. State*, 399 So. 2d 859, 874 (Ala. 1979); *Cook v. State*, 369 So. 2d 1251, 1257-1258 (Ala. 1979). If necessary, a new sentence proceeding in this case could be conducted before a new jury in accordance with the guidelines set out in *Beck v. State*, 396 So. 2d 645, 662-664 (Ala. 1980). *See, Ritter v. State*, 403 So. 2d 154, 157 (Ala.) (separate opinion of Jones, J., joined by Maddox and Adams, J.J.), *vacated and remanded on other grounds*, 102 S. Ct. 376 (1981). The new sentencing jury would not be informed of the mandatory penalty language contained in the verdict of the jury which convicted Evans, and the new sentence decision would therefore not be tainted by it.

[2]For the reasons discussed on pp. 18-19, *infra*, Evans' sentence as well as his conviction is valid and should be reinstated.

Court relied more on *Keeble v. United States*, 412 U.S. 205 (1973), than on any other precedent, 447 U.S. at 633-635, and *Keeble* is a non-capital case that expressly espouses due process principles. In addition, this Court's statement, discussing evidentially supported lesser included offense instructions, that it was not deciding "whether the Due Process Clause would require the giving of such instructions *in a non-capital case*," 447 U.S. at 638 n. 14 (emphasis added), implies that the Court *was deciding* that the Due Process Clause requires the giving of such instructions *in a capital case. See, United States ex. rel. Brodie v. Hilton*, 496 F. Supp. 619, 622 (D.N.J. 1980) (referring to *Beck's* "conclusion that due process was denied").

Moreover, language, history, and precedent confine the purview of the Eighth Amendment's Cruel and Unusual Punishment Clause to issues of punishment — its nature, its purpose, its proportionality, its pattern, and the conditions under which it is imposed. *E.g., Rhodes v. Chapman*, 101 S. Ct. 2392 (1981); *Estelle v. Gamble*, 429 U.S. 97, 102-105 (1976); *Coker v. Georgia*, 433 U.S. 584, 591-592, 598-600 (1977) (plurality opinion); *Gregg v. Georgia*, 428 U.S. 153, 169-176, 186-187 (1976) (joint opinion of Stewart, Powell, and Stevens, J.J.); *Furman v. Georgia*, 408 U.S. 238 (1972). In its two hundred year history, this Court has never invalidated on Eighth Amendment grounds a *conviction* as distinguished from a punishment.[5]

Unless this Court is willing "to wrench the Eighth Amendment from its language and history," *Rhodes v. Chapman*, 101 S. Ct. at 2399 (1981), the Due Process Clause and not the Eighth Amendment determines the validity of Evans' conviction.

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[5] *Weems v. United States*, 217 U.S. 349, 382 (1910), in which the entire proceedings were dismissed for want of an alternative punishment is no exception, because it was the punishment and not the conviction held to violate the Cruel and Unusual Punishment Clause. Nor is *Robinson v. California*, 370 U.S. 660 (1962), an exception, since the holding of that case was that the punishment — any punishment — was cruel and unusual when inflicted for a status crime.

2. The Eighth Amendment is Not Violated in a Case by the Mere Existence of an Unconstitutional Provision Which Neither Applies to Nor Affects the Case

Even if this case is controlled solely by the Eighth Amendment, the fact that the preclusion clause did not harm or affect Evans is still determinative. As the cases cited on pp. 2-3 of this brief, above, indicate, this Court has always adhered to the doctrine that capital sentencing errors which violate the Eighth Amendment do not vitiate otherwise valid capital convictions. Implicit in that doctrine is a concept at least akin to a requirement of harm —the Eighth Amendment and its remedies extend only so far as is necessary to correct the harm done by the defect or error in question.

In this case, if the preclusion clause did violate the Eighth Amendment, it could only have done so in those cases in which it had some effect — either by barring lesser included offense instructions which otherwise would have been given, or by causing a defendant to forego presentation of lesser offense evidence that he would otherwise have presented. The preclusion clause had neither effect in this case. Brief for Petitioners at 22-30. Therefore, it did not violate the Eighth Amendment in this case.

Stated differently, it is at war with logic to suggest that an otherwise permissible punishment becomes "cruel and unusual" in a case because of the mere existence of a statutory provision which has absolutely no effect in the case. *Cf., Dobbert v. Florida*, 432 U.S. 282, 300 (1977) (rejecting a capital defendant's ex post facto claim because it amounted to "complaining in the abstract about some change in the law, which as events proved, would have no applicability to his case.") The absurdity of Evans' position is illustrated by analogy to *Coker v. Georgia*, 433 U.S. 584 (1977), which struck down as violative of the Eighth Amendment the part of Georgia's statute which made non-homicide rape a capital offense. If the Eighth Amendment is violated by the mere existence of an unconstitutional provision in a capital

statute without regard to whether that provision harms or affects a particular defendant, then the convictions or at least the death sentences are due to be set aside in all Georgia pre-*Coker* capital cases including those non-rape cases that clearly involved murder.[6] It matters not that the *Coker* provision did not apply to and had no effect in those cases — something which is equally true of the preclusion clause in this case —because it is Evans' contention that harm is conclusively presumed in all Eighth Amendment cases.

Whether it be described as a threshold requirement of harm or as an inherent restriction of the remedy to cases actually affected, the Eighth Amendment does embody limitations inconsistent with Evans' position in this case.

C. Evans' Argument that the Harm and Prejudice Requirement Should Be Dispensed with Because of the Nature of the Preclusion Clause

1. The Record is Not Incomplete or Flawed

Contrary to Evans' assertions, the record is not incomplete concerning whether the existence of the preclusion clause caused Evans' self-destructive course of conduct. The record contains voluminous evidence not only of the objective facts concerning Evans' course of conduct but also of Evans' motivation in pursuing that course of conduct. Brief for Petitioners at 3-7 and 25-30. The record also contains the conclusions of the psychiatrist who examined Evans for the purpose of determining his mental state and motivation. (A. 27-28) Evans' assertion that the State's position is based on nothing more than "amateur psychological speculation" not only flies in the face of the exten-

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[6]Likewise, Evans' contention would mean that every Georgia capital conviction or at least every death sentence imposed before *Godfrey v. Georgia*, 446 U.S. 420 (1980), was due to be set aside because of that decision, even if the aggravating circumstance condemned in *Godfrey* was not applied and had no effect in that particular pre-*Godfrey* case.

sive objective evidence and Evans' own sworn statements at the time, but also conveniently ignores the expert *professional* psychiatrist's determination that Evans was "sincere in seeking the death penalty, preferring extinction to a long prison sentence." (A. 28) *Accord, Evans v. State*, 361 So. 2d 654, 662 (Ala. Cr. App. 1977) ("A careful reading of this record convinces this Court . . . . [that Evans] is sincere in seeking the death sentence, preferring this course to a long prison sentence."), *aff'd*, 361 So. 2d 666 (Ala. 1978), *cert. denied*, 440 U.S. 930 (1979).

The existence of the preclusion clause did not "flaw" the record, as Evans suggests. Evans concedes that "the Alabama preclusion clause did not absolutely bar a defendant from presenting evidence of a lesser included offense." Brief for Respondent at 21.[7] But he contends that the clause

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[7]The opinion in *Reed v. State*, 407 So. 2d 162, 163 (Ala. 1981) (on rehearing), contains a statement that because the preclusion clause did not allow lesser offense jury instructions, "any offer of evidence thereof, or any plea based thereon, would have been irrelevant and impermissible at trial under that statute." To the extent that statement suggests that a pre-*Beck* defendant could not present and have admitted lesser offense evidence, then it is clearly wrong, as Evans' concession recognizes.

Because proof of a lesser included offense must by definition tend to negate an element of the higher offense, *see, e.g., Sansome v. United States*, 380 U.S. 343, 350 (1965); *Payne v. State*, 391 So. 2d 140, 143 (Ala. Cr. App.), *cert. denied*, 391 So. 2d 146 (Ala. 1980), any lesser offense evidence was relevant and admissible notwithstanding the preclusion clause because such evidence would always — by definition — tend to disprove an element of the capital offense. *Reed v. State*, 407 So. 2d at 164 (Maddox, J., concurring specially). Indisputable proof that a pre-*Beck* capital defendant could introduce lesser offense evidence notwithstanding the preclusion clause is the fact that most, including Beck himself, *Beck v. Alabama*, 447 U.S. at 629-630, actually did.

It may be that the statement in the *Reed* opinion is simply "ambiguous." *Reed v. State*, 407 So. 2d at 165 (Maddox, J., concurring specially). If not, then it is a clearly erroneous characterization of how the preclusion clause operated, with the clarity of the error being underscored by Evans' concession here that the clause did not bar lesser offense evidence. This Court is concerned not with how a state court characterizes the operation of a state law but rather with how that law actually operated, *Corn Products Refining Co. v. Eddy*, 249 U.S. 427, 432 (1919), and this Court alone must make the final judgment concerning histori-

discouraged the presentation of such evidence and thereby "flawed" the trial record. On p. 23 & n. 13 of his brief, Evans argues that the preclusion clause discouraged presentation of lesser offense evidence, because it would have been "folly" for a defendant to present such evidence since it would have "created a great risk of conviction for no ostensible gain." That argument should be rejected for three reasons. First, the vast majority of pre-*Beck* capital defendants, including Beck himself, *Beck v. Alabama*, 447 U.S. at 629-630, *did* present lesser offense evidence. Second, instead of discouraging it, the existence of the preclusion clause actually *encouraged* presentation of lesser offense evidence in Evans' unusual case. Brief for Petitioners at 28-29. Third, it is absurd to suggest that Evans was frightened out of presenting lesser offense evidence by the prospect that it would enhance the risk that he would be convicted of the capital offense since the alternative course of conduct he chose was to affirmatively seek such a conviction.

Moreover, even if the preclusion clause had "flawed" the trial record or caused it to be incomplete, it was incumbent upon Evans in this habeas proceeding to prove as much by proving that there was lesser offense evidence and that he would have presented it had the clause not existed. Brief for Petitioners at 30-36.

2. This Court's Decisions Do Not Support Evans' Position

The cases cited on pp. 21-24 of Evans' brief do not support his position that the harm and prejudice prerequisite should be dispensed with in this case. At most, those cases are illustrative of the exception recognized in Brief for Petitioners at 32: a showing of prejudice is not always necessary where a state has denied or significantly impaired a right which is specifically guaranteed in the

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cal facts and their legal effect in constitutional disputes. *Napue v. Illinois*, 360 U.S. 264, 271-272 (1959); *Truax v. Corrigan*, 257 U.S. 312, 324 (1921).

Bill of Rights or is recognized as encompassed within the due process right to fair trial. Four of the cases involve specific Sixth Amendment guarantees.[8] While the other two cases are due process cases, they both involve a specific right recognized as encompassed within the due process right to fair trial.[9] Evans was not denied a specific Bill of Rights guarantee nor was he denied a specific right recognized as encompassed within the due process right to a fair trial. Instead, Evans' claim is that the mere existence of the preclusion clause rendered his trial and conviction unfair. That is a fundamental fairness due process claim which requires proof of actual prejudice. See pp. 4-5, above, and Brief for Petitioners at 30-33.

A second glaring distinction between the cases Evans cites on pp. 21-24 of his brief and the present case is that none of those cases were habeas corpus proceedings. The significance of this distinction is illustrated by *Holloway v. Arkansas*, 435 U.S. 475 (1978), and its subsequent explication in *Cuyler v. Sullivan*, 446 U.S. 335 (1980). While

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[8] *Holloway v. Arkansas*, 435 U.S. 475 (1978), *White v. Maryland*, 373 U.S. 59 (1963), and *Hamilton v. Alabama*, 368 U.S. 52, 54 (1961), are right to counsel cases. *Davis v. Alaska*, 415 U.S. 308 (1974) is a confrontation clause case.

Even when a specific Bill of Rights guarantee is denied, a showing of prejudice is sometimes essential to establish infringement, *see, e.g., Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980), or to warrant reversal once infringement is established, *see, e.g., United States v. Morrison*, 449 U.S. 361 (1981). In Evans' brief at 24 n. 14, he argues that the *Morrison* decision applies only to "the most intrustive remedy of all, dismissal." Not so. Necessarily implicit in *Morrison* is a holding that because of the lack of prejudice the Sixth Amendment violation in that case would not merit reversal of a conviction either. Otherwise, this Court's action in reinstating the indictment would have been utterly futile.

[9] *Webb v. Texas*, 409 U.S. 95 (1972), involved denial of the right to present testimony, which is essential to a fair trial, as the Sixth Amendment right to compulsory process indicates, *see, Washington v. Texas*, 388 U.S. 14 (1967). *Ferguson v. Georgia*, 365 U.S. 570 (1961), involved denial of the right to assistance of counsel in presenting the defendant's own testimony, which is essential to a fair trial as the Sixth Amendment right to counsel indicates, *see, Gideon v. Wainwright*, 372 U.S. 335 (1963).

Holloway contains some language favorable to Evans' position, that language is best understood as a "prophylactic gloss," *Holloway v. Arkansas*, 435 U.S. at 493 (dissenting opinion of Powell, J., joined by Blackmun and Rehnquist, J.J.), designed to ensure that a defendant is permitted to demonstrate prior to trial, if he offers to do so, the prejudice which will flow from his attorney's conflict of interest. As the subsequent decision in *Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980) (majority opinion by Powell, J.), explains, when a conflict of interest claim is not made until a federal habeas proceeding, the prophylactic rationale of *Holloway* does not apply and the defendant "must establish that an actual conflict of interest adversely affected his lawyer's performance." Since Evans did not request an opportunity to demonstrate prior to trial how the existence of the preclusion clause would prejudice him, he must now demonstrate that it actually did adversely affect him.

Far from supporting Evans' contention that post hoc determinations of prejudice are not feasible, this Court's decisions establish the contrary. For example, *United States v. Marion*, 404 U.S. 307, 324-326 (1971), held that "the real possibility of prejudice" inherent in a 38-month delay was insufficient to establish a due process violation based on pre-indictment delay, and required that "substantial prejudice" must be proven. Such a requirement is necessarily premised on the feasibility of a post hoc inquiry into the existence and extent of prejudice. Another example is *Kentucky v. Whorton*, 441 U.S. 786, 789-790 (1979) (whether failure to instruct on presumption of innocence deprived the defendant of a fair trial depends on a post hoc evaluation of "the totality of the circumstances" to gauge prejudice.)

Nor are inquiries into prejudice precluded when subjective mental states are involved and the issue depends on questions of motivation or impact. *Smith v. Phillips*, 50 U.S.L.W. 4190 (Jan. 25, 1982), sanctions the feasibility of a post-trial inquiry into whether a juror placed in a potentially compromising position was actually biased, an inquiry into the juror's mental state at the time of the indiscretion. Similarly, the "cause" part of the "cause and

prejudice" exception to *Wainwright v. Sykes*, 433 U.S. 72 (1977), is dependent on a post hoc determination of the cause of inaction, a determination that will virtually always delve into questions of motivation. Finally, in holding that *Bruton* error was harmless in *Harrington v. California*, 395 U.S. 250, 254 (1969), this Court noted that "[o]ur judgment must be based on our own reading of the record and on what seems to us to have been the probable impact of the two confessions on the minds of an average jury." Likewise, in this case this Court's judgment can and should be based on its own reading of the record and on what seems to have been the probable impact (or lack of impact) of the preclusion clause on Evans' mind.[10]

3. Evans Has Never Attempted to Make the Record More Complete and He is Not Asking for an Opportunity To Do So Now

Evans' contention that the record is incomplete or flawed is belied by the fact that Evans has never sought to make the record more complete or to correct what he says are its flaws by offering evidence that the preclusion clause affected his course of action. Since this is a habeas corpus case Evans had ample opportunity to present any evidence he wanted in the district court. Indeed, a hearing was held on the habeas petition and Evans did call a witness to testify on another issue, but Evans offered no evidence at all that the existence of the preclusion clause had affected him in any way. Brief for Petitioners at 9. Evans himself did not even testify that the preclusion clause had influenced him.

Since the district court proceedings occurred before the *Beck* decision, Evans might have argued in the court of

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[10]In *Harrington* this Court was forced to focus its impact query on "an average jury" rather than on the particular jurors who sat in that case, because "[w]e of course do not know the jurors who sat." 395 U.S. at 254. In this case, the focus should be on Evans in particular rather than on an average defendant, because we of course do know Evans. We know him through the abundant evidence of his conduct, through his many sworn statements, and through the psychiatrist's evaluation of him.

appeals that he was entitled to a new hearing so that he could have another opportunity to present evidence of prejudice. Yet he chose not to ask that court to remand the case for such a hearing, and he conspicuously has not asked this Court to do so either.[11]

Instead, in spite of this Court's admonition in *Beck v. Washington*, 369 U.S. 541, 558 (1962), that unfairness must be shown "not as a matter of speculation but as a demonstrable reality," Evans has chosen to stake his position on speculative conjecture such as his guess that "there might have been other evidence that defense counsel could have presented." Brief for Respondent at 29. That Evans prefers pure conjecture instead of a new opportunity to present evidence is telling. Evans has not asked for a new habeas hearing because he knows that since the mere existence of the preclusion clause did not affect him in any way, anything added to the record would not be favorable to him.

D. Evans' Argument that He was Harmed And Prejudiced By the Preclusion Clause

1. Evans' "Instinctive Self-Preservation" Argument is Frivolous

On pp. 26-29 of his brief, Evans contends that the record does contain evidence that would have warranted a lesser offense instruction had it not been for the preclusion clause. Evans points to his grand jury statements that: he

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[11]The State's position is that Evans is not entitled to a new hearing. His habeas petition anticipated the *Beck* decision (A. 49-50), and he was free to offer any evidence of harm and prejudice at the hearing on it. Prior to that hearing, the district court ordered Evans to amend his petition "to aver each and every ground that [he] can conceivably think of that can be asserted under the conditions prevailing in this factual situation" (A. 55), but Evans still did not offer any proof that the preclusion clause had harmed or prejudiced him. *Cf., Wong Doo v. United States*, 265 U.S. 239 (1924) (Where "[t]he petitioner had full opportunity to offer proof of [a claim] at the hearing on the first petition," to reserve that proof for use in a later petition "was to make an abusive use of the writ of habeas corpus.").

never wanted to hurt anyone during a robbery unless he had to (A. 21); he thought the robbery victim, Mr. Nassar, was going for a gun and it had come down to a choice between Nassar's life and his (A. 19); and once he was confronted with that choice, well "that's pure instinct. That's self-preservation. I'm going to fire." (A. 19) Evans' argument that those statements create an intent to kill issue and justify a non-capital felony murder instruction is utter nonsense.

It is undisputed that Evans went into the pawn shop intending to kill Nassar if Nassar tried to defend himself. In the same answer where he made the instinctive self-preservation remarks, Evans told the grand jury that, "I was going to shoot him if he reached for a — a firearm, yeah." (A. 19) Ritter testified at trial that: "We knew we might have to kill somebody during any robbery. We had discussed it before. If anybody went for a gun, that's what was going to happen." (Tr. 220) Evans testified that Nassar was not the first man he had killed (A. 21), and that he felt no remorse about the killing (A. 19, 42). Evans not only swore that he fully understood the consequences of his act when he shot Nassar (A. 19), but also swore that he would kill again in the same situation: "If I had to do it again, yeah, without a doubt." (A. 21)[12]

So, Evans' "instinctive self-preservation" argument reduces itself to the absurd proposition that there is no intent to kill if a robber deliberately murders the victim because he thinks the victim is trying to get a gun to defend himself. That argument should be rejected as frivolous. *See, e.g., Henson v. State*, 247 Ala. 125, 22 So. 2d 905 (1945) (claim of self-defense unavailable to one not free from fault in bringing about the difficulty); *Raines v. State*, 342 So. 2d 1348, 1357 (Ala. Cr. App. 1977) ("This has to be the most

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[12]Even if Evans had not formed the intent to kill until Nassar dropped down and started crawling away, under Alabama law premeditated intent to kill may be formed "the instant before the killing," *Daughdrill v. State*, 113 Ala. 7, 21 So. 378, 386 (1897), and need exist "only for a moment or instant of time," *Caldwell v. State*, 203 Ala. 412, 84 So. 272, 276-277 (1919). Evans has never contended that the gun fired accidently.

novel claim ever made in a robbery-murder charge."). If not rejected as frivolous, then it presents a question of state law that should be certified to the Alabama Supreme Court. Brief for Petitioners at 43.[13]

2. Evans' Parole Eligibility Argument Has No Basis in Fact

Evans argues on pp. 25-26 of his brief that had a lesser included offense option with attendant parole possibility been available, "Evans may well have made a very different choice as to how to proceed." Such unsupported speculation should be rejected for five reasons. First, it ignores the fact that there simply was no lesser offense evidence to present and therefore no possibility of presenting any.

Second, even if Evans could somehow have convinced the jury in this case that he lacked intent to kill, there was no chance at all that he ever would have gotten out of prison. The only lesser included offense possibility was a conviction for both felony murder and robbery, which would have meant one life sentence plus an additional sentence of ten years to life. Petitioner's Brief at 28-29 n. 23. Added to those two sentences would have been another Alabama sentence of 10 years to life for an unrelated non-capital robbery Evans had committed in Mobile after he

[13]On pp. 14 and 29 of his brief, Evans speculates on what would have happened if his instinctive self-preservation remarks "had been developed by competent counsel and presented at trial." The implication that Evans did not have competent counsel ignores the fact that his two experienced trial counsel (Tr. 6, 38, 49, 235-236) repeatedly urged him in vain not to follow the course of action that he did. (Tr. 72-73; A. 41-42) *Evans v. State*, 361 So. 2d 654, 661-662 (Ala. Cr. App. 1977) ("This Court specifically finds that both Evans and Ritter were fully, fairly, and thoroughly represented by these attorneys.").

In any event, no ethical attorney could have "developed" and presented evidence contrary to Evans' own persistent admissions that he intentionally killed Nassar, because an attorney may not participate in the creation of evidence "when he knows or it is obvious that the evidence is false," nor may he present false evidence. *Alabama Canons of Professional Responsibility*, DR 7-102(A)(4) and (A)(5).

robbed and murdered Nassar, and to which he had already pleaded guilty. (Tr. 69-71, 304-305, 326) In addition, Evans' Alabama sentences are only part of the sentences he would have received if Alabama had not sentenced him to death. During his cross-country crime spree Evans committed more than three dozen violent felonies in seven different states. (A. 39; Tr. 288-292, 321-330) After he was apprehended, Alabama authorities received warrants from at least four other states charging Evans with numerous counts of burglary, armed robbery, and kidnapping. (Tr. 233-234, 348-370) Those states and others indicated that they would prosecute Evans if he was not sentenced to death in Alabama. (Tr. 233-234) And of course Evans was a parole violator when the spree began. (Tr. 231-232, 238, 321) So, regardless of the verdict in this case there was never any chance that Evans would ever be released.

Third, even if Evans somehow could have been released after serving forty or fifty years, a tiny portion of all the many sentences he was due to receive, that would not have changed his course of conduct. Evans not only preferred death to the absence of any possibility of parole, he also preferred death to a long prison sentence. (A. 28); *Evans v. State*, 361 So. 2d 654, 662 (Ala. Cr. App. 1977).

Fourth, Evans' contention that he might have acted differently if the preclusion clause had not foreclosed the possibility of parole fails to explain either the thrasonic nature of his behavior or the fact that he began his self-destructive legal strategy before he knew of the preclusion clause. Petitioner's Brief at 25-26.

Fifth, Evans' unsupported speculation about what might have happened if the preclusion clause had not existed is just that — unsupported speculation. Evans did not testify that he would have acted any differently, nor is he asking for another opportunity to present evidence on the issue.

3. The Burden of Proof is on Evans

Chapman v. California, 386 U.S. 18 (1967), held that where a constitutional violation is established the burden is

on the state to prove beyond a reasonable doubt the absence of harm. That rule is not applicable here because a constitutional violation has not been established.[14] Since harm and prejudice is an element of Evans' fundamental fairness due process claim, the burden is on him to prove harm and prejudice, Petitioners Brief at 30-33, especially since this is a habeas corpus case. *Id.*, at 35-36; *Rose v. Lundy*, 50 U.S.L.W. 4272, 4281-4282 (March 3, 1982) (dissenting opinion of Stevens, J.) (habeas corpus should not extend to any constitutional error, even that harmful enough to require reversal on direct appeal, unless the error rendered the trial fundamentally unfair).

In any event, even if the burden were somehow on the State, the record in this case proves, even beyond a reasonable doubt, that the preclusion clause did not harm or prejudice Evans.

II. EVANS' ARGUMENTS CONCERNING THE EFFECT OF HIS GUILTY PLEA SHOULD BE REJECTED

Evans' guilty plea is an independently adequate reason that his conviction is valid. Petitioner's Brief at 36-42. In *Lane v. State*, No. 80-803 (Ala., Feb. 5, 1982), pp. 1a-6a, *infra*, the Alabama Supreme Court held that a guilty plea to a capital charge, which must still be submitted to a jury pursuant to *Prothro v. State*, 370 So. 2d 740 (Ala. Cr. App. 1979), is effective under Alabama law to waive all nonjurisdictional defects including any involving the preclusion clause. While the capital conviction in *Lane* did not result in a death sentence, the decision does authoritatively demonstrate that the court of appeals and

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[14] *Beck v. Alabama*, 447 U.S. 625 (1980), establishes a constitutional violation when lesser offense instructions which are supported by the evidence at trial are not given, but it did not hold that the mere existence of the preclusion clause was a constitutional violation in a case in which the clause did not apply.

Evans are wrong — a guilty plea to a capital charge *is* given waiver effect under Alabama law.[15]

Evans' argument that this case proceeded "just as though Evans had not pleaded not guilty," ignores the facts that a written guilty plea was admitted into evidence (A. 33-37; Tr. 252), and the Alabama Supreme Court held that the guilty plea rendered harmless and waived a defect in the jury instructions. *Ritter v. State*, 375 So. 2d 270, 276 (Ala. 1979). Nor is the fact that the Alabama appellate courts considered various constitutional issues in this case inconsistent with waiver of non-jurisdictional defects. Petitioner's Brief at 39 n. 34.

III. EVANS' SENTENCE IS VALID

Evans was not sentenced under a mandatory death penalty statute. See, p. 1, above. Even assuming that the jury verdict form requirement unconstitutionality tended to motivate the trial judge to impose a sentence of death, see pp. 1-2, above, Evans' death sentence is still valid because that error, if any, was harmless beyond a reasonable doubt in this case.

At every stage of the proceedings, Evans sought the death penalty. He expressed his desire to be sentenced to death even before he was captured (A. 20-22); to law

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[15]Footnote 1 of the *Lane* opinion, p. 2a, *infra*, reconciles that decision with *Ritter v. State*, 403 So. 2d 154 (Ala.), *vacated and remanded*, 102 S. Ct. 376, *on remand*, No. 77-798 (Ala. 1981), *certiorari pending*, No. 81-1600 (U.S., filed Feb. 27, 1982), by explaining that the Alabama Supreme Court is divided over whether a guilty plea waives all non-jurisdictional defects in a death case. The court is not divided on whether the state law waiver effect of a guilty plea in a capital case varies depending on the penalty — it does not. Instead, the court is divided on the federal issue of whether it violates the Constitution to give any guilty plea waiver effect in a death sentence case. That is why footnote 1 of the *Lane* opinion emphasizes that the Alabama Supreme Court's *Ritter* decision "was based on federal constitutional grounds."

The State's position is that since a guilty plea to a capital charge waives all non-jurisdictional defects as a matter of state law regardless of the penalty imposed, that waiver is constitutionally effective in both death and non-death cases.

enforcement officers after his arrest (Tr. 291); to the grand jury (A. 17, 20); to the trial jury (A. 38); and to the sentencing judge (A. 30, 38). After conducting a sentence hearing and finding that the aggravating circumstances "far outweigh[ed]" any mitigating circumstances, the judge complied with Evans' request that he be sentenced to death. (Tr. 241-242) Any other sentence was inconceivable, not only because Evans wanted the death penalty but also because he was remorseless (A. 41-42); he had killed before (A. 21, Tr. 232), and he said he would kill again (A. 21, 38). If the jury verdict form requirement was error, whatever effect it may have had on a judge's sentencing decision in some other case, it was harmless beyond a reasonable doubt in this unusual case. See p. 12, n. 10, above.

IV. THE CERTIFICATION QUESTIONS

If this Court agrees with the State that Evans' instinctive self-preservation argument is frivolous, see pp. 13-15, above, then it is clear that Evans would not have received any lesser included offense instructions regardless of the preclusion clause, and the first state law question discussed in Brief for Petitioners at 43 need not be certified. If this Court concludes that Evans' conviction is valid irrespective of what effect his guilty plea had, see pp. 17-18, above, then the second state law question discussed in Brief for Petitioners at 43 need not be certified. See Brief for Petitioners at 44 n. 37. Since Evans has apparently abandoned any state court claim he may have had that he was entitled to have his conviction or sentence invalidated as a matter of Alabama law, the third state law question, Brief for Petitioners at 44, clearly no longer needs be certified.

Evans' argument that it was inconsistent for the State to move for certification after it had conceded that he has no state remedies left to exhaust, Brief for Respondent at 37-39, is premised on the proposition that once a habeas petitioner has exhausted or forfeited his state remedies no important, unresolved state law questions can arise in a

subsequent federal habeas proceeding. This case illustrates that that proposition is absurd. The fact that a habeas petitioner can no longer have his federal claims ajudicated in state court does not in any way foreclose certification of state law issues or diminish its desirability.[16]

CONCLUSION

This Court should reject Evans' arguments and reverse the court of appeals.

Respectfully submitted,

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Dated: March 12, 1982

[16]Evans' cynicism above the motives of the attorneys for the State in moving for certification, Brief for Respondent at 37-39, is not only unjustified but is also particularly unbecoming since the district court found that it was Evans' attorneys — not the attorneys for the State — who had "trifled with the law" and engaged in actions that were "extremely borderline at best on ethical practice." (R. 44-48)

APPENDIX A

February 5, 1982

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT
THE SUPREME COURT OF ALABAMA
OCTOBER TERM, 1981-82

Ex parte State of Alabama

Petition for Writ of Certiorari
to the Court of Criminal Appeals

(Re: Homer Lawrence Lane
v.
State of Alabama)

80-803

MADDOX, JUSTICE.

The sole issue in this case is whether a defendant who entered a plea of guilty to a capital offense, and who was sentenced to life without parole, is entitled to withdraw that plea of guilty and obtain a new trial in light of *Beck v. Alabama*, 447 U.S. 625, 65 L. Ed. 2d 392, 100 S. Ct. 2382 (1980); on remand, *Beck v. State*, 396 So. 2d 645 (Ala. 1981) (wherein the Court held that the constitutionally infirm clause in Alabama's death penalty statute, which precluded trial judges from giving lesser included offense instructions in capital cases, could be severed from the death penalty statute).

When the state filed its petition for certiorari in this Court, there was pending here a case which presented the same issue. The case was *Graham v. State*, 403 So. 2d 275 (Ala. Cr. App. 1980); cert. quashed 403 So. 2d 286 (Ala. 1981). In *Graham*, the Court of Criminal Appeals upheld the conviction. In this case, a majority of the Court of Criminal Appeals reversed Lane's conviction on "mandate of the Supreme Court of Alabama in *Ritter v. State* [403 So. 2d 154

(Ala. 1981)] and authorities therein cited, and *Ricardo Cook v. State*, MS. 6 Div. 461, this day decided. . . ."

In *Ricardo Cook v. State*, [MS. 6 Div. 561, June 23, 1981], ___ So. 2d ___ (1981), a majority of the judges of the Court of Criminal Appeals were of the opinion that ". . . every pre-*Beck* death case must be reversed, regardless of the lack of evidence on lesser offenses." In reaching this conclusion, the Court of Criminal Appeals has misapplied the law announced by this Court in *Beck* and *Ritter v. State*, 403 So. 2d 154 (Ala. 1981), and has failed to apply the principles of law set forth in *Graham v. State*, 403 So. 2d 275 (Ala. Cr. App. 1980), cert. quashed 403 So. 2d 286 (Ala. 1981).

This Court did not write an opinion in *Graham*, but the rationale upon which the judgment to quash the writ was based in *Graham* was that a plea of guilty voluntarily made in a case wherein the death penalty was not imposed waives all non-jurisdictional defects.[1]

What was the effect of Lane's plea of guilty which was voluntarily made and upon which his judgment of conviction was based and upon which he was sentenced to life imprisonment without parole?

One of the most basic principles of the criminal law was stated in *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709 23 L. Ed. 2d 274 (1969), where the Supreme Court opined:

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[1]There is disagreement on this Court on whether a plea of guilty in a capital case *when the death penalty is imposed* also waives all non-jurisdictional defects. See dissenting opinion in *Ritter v. State*, 403 So. 2d at p. 155. The Supreme Court of the United States has agreed to review the *Ritter* case. Certiorari was granted by the United States Supreme Court on October 15, 1981, 50 USLW 3277; and that case was remanded to us for further consideration in light of *Reed v. State*, on October 26, 1981; answer of this Court on remand from the United States Supreme Court dated December 11, 1981, held that the decision in *Ritter* was based on federal constitutional grounds. ___ So. 2d ___ (1981).

> "... A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment. ..."

395 U.S. 238, 242, 23 L. Ed. 2d 274, 279.

It is universally held that a voluntary plea of guilty waives all non-jurisdictional defects. *Lancaster v. State*, 362 So. 2d 271 (Ala. Crim. App. 1978), cert. den. 362 So. 2d 272 (1978); *Franklin v. United States*, 589 F. 2d 192, 194, 195 (5th Cir. 1979), cert. den. 441 U.S. 950, 99 S. Ct. 2177, 60 L. Ed. 2d 1055.

The factual setting in this case is not dissimilar to the fact situation in *Brady v. United States*, 397 U.S. 742, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970). *Brady* involved the Federal Kidnapping Statute which provided that only a jury could set a death penalty. Brady, charged under the Act, sought to avoid the death penalty, first, by waiving trial by jury and, when that was disallowed, by pleading guilty. The Supreme Court of the United States, a few years later, in *United States v. Jackson*, 390 U.S. 570, 88 S. Ct. 1209, 20 L. Ed. 2d 138 (1968), invalidated and severed the death penalty provision from the Federal Kidnapping Statute on the grounds that it tended to coerce defendants into waiving trial by jury or to plead guilty. When Brady was sentenced under the Federal Kidnapping Statute upon his plea of guilty, the Supreme Court of the United States had not invalidated the death penalty provision from the statute. The Court refused to set aside Brady's conviction. The Court opined:

> "It may be that Brady, faced with a strong case against him and recognizing that his chances for acquittal were slight, preferred to plead guilty and thus limit the penalty to life imprisonment rather than to elect a jury trial which could result in a death penalty. But even if we assume that Brady would not have pleaded guilty except for the death penalty

provision of [the federal kidnapping statute], this assumption merely identifies the penalty provision as a 'but for' cause of his plea. That the statute caused the plea in this sense does not necessarily prove that the plea was coerced and invalid as an involuntary act."

397 U.S. 742, 749-750, 25 L. Ed. 2d 747, 757.
The Court added:

"It is true that Brady's counsel advised him that [the federal kidnapping statute] empowered the jury to impose the death penalty and that nine years later in *United States v. Jackson, supra*, the Court held that the jury had no such power as long as the judge could impose only a lesser penalty if trial was to the court and there was a plea of guilty. But these facts do not require us to set aside Brady's conviction.

"Often the decision to plead guilty is heavily influenced by the defendant's appraisal of the prosecution's case against him and by the apparent likelihood of securing leniency should a guilty plea be offered and accepted. Considerations like these frequently present imponderable questions for which there are no certain answers; judgments may be made that in the light of later events seem improvident, although they were perfectly sensible at the time. The rule that a plea must be intelligently made to be valid does not require that a plea be vulnerable to later attack if the defendant did not correctly assess every relevant factor entering into his decision. A defendant is not entitled to withdraw his plea merely because he discovers long after the plea has been accepted that his calculus misapprehended the quality of the State's case or the likely penalties attached to alternative courses of action. More particularly, absent misrepresentation or other impermissible conduct by state agents, *cf., Von Moltke v.*

Gillies, 332 U.S. 708, 92 L. Ed. 309, 68 S. Ct. 376 (1948), a voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise. A plea of guilty triggered by the expectations of a competently counseled defendant that the State will have a strong case against him is not subject to later attack because the defendant's lawyer correctly advised him with respect to the then existing law as to possible penalties but later pronouncements of the courts, as in this case, hold that the maximum penalty for the crime in question was less than was reasonably assumed at the time the plea was entered.

"The fact that Brady did not anticipate *United States v. Jackson*, supra, does not impugn the truth or reliability of his plea. We find no requirement in the Constitution that a defendant must be permitted to disown his solemn admissions in open court that he committed the act with which he is charged simply because it later develops that the state would have had a weaker case than the defendant had thought or that the maximum penalty then assumed applicable has been held inapplicable in subsequent judicial decisions."

397 U.S. 742, 756-757, 25 L. Ed. 2d 747, 761.

In reaching the conclusion we reach in this case, we have considered the fact that the record indicates that Lane contended in his first petition for writ of error coram nobis that he had a defense of alibi. *Lane v. State*, 7 Div. 700 (Ala. Crim. App. 1979), cert. den. 386 So. 2d 216 (Ala. 1979).

The decision of the Court of Criminal Appeals conflicts with this Court's decision in *Graham v. State*, 403 So. 2d 275 (Ala. Cr. App. 1980), cert. quashed 403 So. 2d 286 (Ala. 1981). It is due to be reversed and the cause remanded to

that court for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

Tobert, C. J., Faulkner, Jones, Almon, Shores, Embry, Beatty and Adams, JJ., concur.